ability cause death. Such an act becomes murder only if the person who commits the act, and death results, knew, when committing the act, that it was so imminently dangerous that it would in all probability cause death, or such bodily injury as was likely to cause death.

Another ground on which we came to the conclusion that the murder conviction could not stand was that on the evidence no reasonable jury could have found beyond a reasonable doubt that the appellant at the material time knew that he was driving in a manner that was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to result in death. The prosecution evidence of what took place along Bedok Road was given by Miss Poh and Say and the state of the traffic during the most material time was given by an independent eye-witness, Abdul Rahim. Abdul Rahim said he first saw the two cars approaching him about 400 yards from where he was standing from the direction of Changi Road. There was no other traffic between him and them. The picture then, according to the prosecution evidence, was of an angry, jilted young man, driving a 1954 model Ford Prefect along Bedok Road, overtaking and then being overtaken and finally overtaking another car in which his former "steady" girl friend was a passenger. When overtaking the Morris car on the final occasion, he drove his Ford car in such a manner as to first come into contact with the rear and then with the front off-side mudguard of the Morris car. Having regard to what had happened along Changi Road, but bearing in mind that there was no other traffic at the material time while both cars were proceeding along Bedok Road and that no harm was caused to the passengers or to the Morris car which stopped by the left hand side of the road, the most adverse inference that can be drawn from the appellant's manner of driving was that he intended to cause harm to the passengers of the Morris car.

In our judgment there was no sufficient evidence on which a reasonable jury could find the appellant guilty of murder under the fourth clause of section 300 of the Penal Code.

Conviction for murder set aside and conviction under section 26 of the Road Traffic Ordinance substituted.

Solicitors: *Osborne-Jones & Co.*

HIMATSING & CO. v. P.R. JOITARAM

[C.A. (Wee Chong Jin C.J., Tan Ah Tah and Chua JJ.) August 31, 1970]

[Singapore — Civil Appeal No. 16 of 1970]

Contract — Breach of commercial contract — Failure to deliver goods in accordance with stipulated term — Time — Whether esence of contract — Mercantile or trade usage among Indian merchants in Singapore.

Sale of Goods — Delivery — Time — Essence of contract — Waiver — Lack of evidence of — Sale of Goods Act, 1893, s. 10(1).

The plaintiff (respondent) claimed damages against the defendant firm (the appellant) for breach of contract. The plaintiff had agreed to sell and the defendant firm to purchase 10 tons of Indian black cardamon at the price of $3.60 per picul. The contract provided for "shipment during June/July, 1966" and for "delivery to buyer's store." The plaintiff delivered 2½ tons in circumstances which resulted in a dispute between the parties. Eventually through their respective solicitors, the defendant firm agreed to accept delivery of the balance of 7½ tons "within 3 days of the arrival at Singapore of the vessel s.s. *Manoloeverette.*" The ship arrived on November 8, 1966 but the plaintiff did not attempt to deliver the balance to the defendant firm until November 21, 1966 when he brought the goods to the defendant firm's shop. The defendant firm refused to accept delivery. Subsequently, the plaintiff sued the defendant firm for breach of contract. The defence, *inter alia*, was that it was an essential term of the contract that delivery be made within 3 days of the arrival of the ship at Singapore, and in this respect time was of the essence of the contract. At the trial the plaintiff called a witness to prove, *inter alia*, a mercantile or trade usage among Indian merchants in Singapore relating to delivery of goods imported by sea into Singapore "that in any contract for the sale of goods where there is a term in the contract requiring delivery within a specified time, that does not make time the essence of the contract in the absence of specific term that the time for delivery stated in the contract shall be of the essence of the contract. All that that term means is that delivery must be made within a reasonable time."

The learned trial judge found: (1) time of delivery was not of the essence of the contract; (2) even if time was of the essence of the contract, "the conduct of the parties ... and particularly that of the defendant had waived his rights regarding this stipulation of time"; (3) accepting there was a mercantile or trade usage of some kind binding on the parties, that "if the defendant wanted to repudiate this contract for non delivery then he should have given the plaintiff at least 24 hours notice of his intention to do so, so that the plaintiff could have had an opportunity to fulfil the contract." The defendant firm appealed.

Held, allowing the appeal: (1) in most mercantile transactions, as regards stipulations other than those relating to time of payment, time is of the essence of the contract. The contract sued on in this case was an ordinary commercial contract for the sale of goods. On the evidence, the plaintiff had failed to prove that as regards the 7½ tons of cardamons the stipulated time of delivery "within 3 days after the arrival of the ship" was not of the essence of the contract;

(2) as regards the question of mercantile or trade usage there was no evidence that the stipulation as to time for delivery was the normal stipulation in this kind of trade;

(3) there was no evidence to support the finding of the learned trial judge that the subsequent conduct of the defendant amounted to a waiver.

Case referred to:-

(1) *Hartley* v. *Hymans* [1920] 3 K.B. 475.

COURT OF APPEAL.

C. S. Woo for the appellant.

J. B. Jeyaretnam for the respondent.

Wee Chong Jin C.J. (delivering the judgment of the court): At the conclusion of the hearing we allowed the appeal and intimated we would give our reasons in writing at a later date. We now do so.

The plaintiff claimed damages against the defendant firm for breach of contract. The plaintiff had agreed to sell and the defendant firm to purchase ten tons of Indian black cardamon (big elcha) at the price of $3.60 per picul. The contract provided for "shipment during June/July, 1966" and for "delivery to buyer's store". The plaintiff delivered 2½ tons in

circumstances which resulted in a dispute between the parties. Eventually, through their respective solicitors, the defendant firm agreed to accept delivery of the balance of 7½ tons. This agreement is contained in three letters passing between their solicitors dated 5th, 8th and 17th October 1966 which were in the following terms: —

"Messrs. Rodrigo & Tock, 5th October 1966.
Singapore.

Dear Sirs,

re: 10 tons Indian Black Cardamon
(Big Elcha) as per Sale
Confirmation dated 22.6.66

We have now received our clients' instructions on your letter of the 29th ultimo.

It is noted that your clients are not able to make immediate delivery of the 7½ tons. Our clients are prepared to take delivery provided that delivery is made not later than the 15th October 1966. If delivery cannot be made by that date, then our clients are not interested in the goods. You will appreciate that our clients cannot allow your clients to have an indefinite period to make delivery in view of the commodity's fluctuating market price.

As to your final paragraph, we are instructed that there are no negotiations pending in respect of the repayment of your clients' debt of $6,000 and your clients are requested to make payment of this amount in full to our clients immediately, failing which our clients may be forced to resort to drastic measures.

Yours faithfully,
Sd: Donaldson & Burkinshaw."

"Messrs. Donaldson & Burkinshaw, 8th October 1966.
Singapore.

Dear Sirs,

re: 10 tons Indian Black Cardamon
(Big Elcha) as per Sale
Confirmation dated 22.6.66

We thank you for your letter dated the 5th instant.

We reiterate that, on receipt of our claim bill, your clients have agreed to accept delivery of the 7½ tons of the above within three days of the arrival of the above goods to be shipped before the 15th of October 1966. Accordingly, our clients cabled the suppliers who have in return informed our clients by cable that the above goods would be shipped before the 15th of October, 1966.

The above goods is scheduled to arrive by the 'Manoloeverett' on the 2nd of November, 1966 and our clients will affect delivery within three days of such arrival, in accordance with the terms of the contract.

Yours faithfully,
Sd: Rodrigo & Tock."

"Messrs. Rodrigo & Tock, 17th October 1966.
Singapore.

Dear Sirs,

re: 10 tons Indian Black Cardamon
(Big Elcha) as per Sale
Confirmation dated 22.6.66

We have now received our clients' instructions on your letter of the 8th instant, and we would confirm that our clients will accept delivery as stipulated in the final paragraph of your letter.

Yours faithfully,
Sd: Donaldson & Burkinshaw."

The vessel s.s. *Manoloeverett* arrived at Singapore on 8th November 1966. The plaintiff did not in fact attempt to deliver the balance of 7½ tons to the defendant firm until 21st November 1966 when he brought the goods to the defendant firm's shop. The defendant firm refused to accept delivery. Before that date, the defendant firm had, through their solicitors, written to the plaintiff's solicitors that as their client had failed to make delivery as agreed they were no longer interested in the goods and reserved their right to lodge a claim against the plaintiff for any loss they may incur as a result of the plaintiff's breach of contract.

Subsequently, the plaintiff commenced the present action alleging the defendant firm were in breach of contract. Paragraph 3 of the statement of claim runs as follows: —

"The goods arrived in Singapore on the 8th November 1966 and the plaintiff was at all times prepared to deliver the goods to the defendant within three days of its arrival but the defendant refused to take delivery thereof".

The defence, *inter alia*, was that it was an essential term of the agreement that delivery be made within three days of the arrival at Singapore of the vessel s.s. *Manoloeverett*, that in this respect time was of the essence of the agreement and that the plaintiff had failed to effect delivery in accordance with this stipulated term.

On the first day of the trial of the action, the plaintiff obtained leave to amend his reply and in the amended reply denied that it was an essential term of the contract that delivery be made within three days of the arrival of the s.s. *Manoloeverett* and alleged that, if time of delivery was of the essence of the contract, the defendant firm had waived their right to require delivery within the stipulated time.

The particulars of waiver set out in the amended reply were: —

"The plaintiff's solicitors wrote on the 5th November 1966 to the defendants' solicitors saying that the plaintiff would make delivery. A reminder was sent on the 8th November 1966. No reply was received from the defendants' solicitors until the 14th November when the three days of the arrival of the said vessel had expired".

At the trial the plaintiff called a witness to prove, *inter alia*, a mercantile or trade usage among Indian merchants in Singapore relating to delivery of goods imported by sea into Singapore. This evidence, although objected to by counsel for the defendant firm, was admitted by the trial judge, although from the record of appeal, counsel for the plaintiff did not in his opening or closing address refer to this alleged trade usage. Before us, but with some difficulty, he spelt out this alleged usage in the following words: —

"The usage relied on is that among Indian merchants in Singapore in any contract for the sale of goods where there is a term in the contract requiring delivery within a specified time, that does not make time of delivery of the essence of the contract in the absence of specific term that the time for delivery stated in the contract shall be of the essence of the contract. All that that term means is that delivery must be made within a reasonable time".

The trial judge in an oral judgment, found that time of delivery was not of the essence of the contract. We set out below his reasons: —

"I say this — though this is a mercantile contract, having regard to the sort of trade, and the manner of dealing between

the 2 parties. The stipulation of 'within 3 days after the arrival of the ship' for delivery which was substituted by the parties for delivery 'not later than 15th October' was the normal stipulation in this kind of trade. I accept the evidence of P.W.3 that this stipulation is generally not insisted upon strictly. Parties are expected to effect delivery within a reasonable time of the arrival of the ship. Even the previous dealing between the parties indicates that when the goods arrived on 2nd August, 1966 delivery was effected only on 24/8/66 and defendant had accepted the delivery without murmur of any delay".

The trial judge also found that even if time was of the essence of the contract, "the conduct of the parties during the crucial days of November — between 2nd November and 21st November — and particularly that of the defendant quite clearly indicates that the defendant had waived his rights regarding this stipulation of time". The trial judge reached this conclusion because he found on the evidence that at no time during the visits made by the plaintiff to the sole proprietor of the defendant firm did the latter inform the plaintiff that he would insist on delivery within the stipulated time. The visits referred to were visits, almost daily, by the plaintiff from about 5th November till 14th November over arrangement for the delivery of the goods.

The trial judge also found, apparently accepting there was a mercantile or trade usage of some kind binding on the parties, that "if the defendant wanted to repudiate this contract for non-delivery then he should have given the plaintiff at least 24 hours notice of his intention to do so, so that the plaintiff could have had an opportunity to fulfil the contract".

We were unable to agree with the trial judge's findings. As regards the issue whether or not time for delivery of the balance of 7½ tons cardamons is of the essence of the contract, the law is contained in section 10(1) of the Sale of Good Act, 1893 which provides: —

"Unless a different intention appears from the terms of the contract stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract".

It is also clear law that in most mercantile transactions, as regards stipulations other than those relating to time of payment, time is of the essence of the contract. As stated by McCardie J. in *Hartley* v. *Hymans*[1] at p. 483:

"It (the common law) looked rather to the nature of the contract and the character of the goods dealt with. In ordinary commercial contracts for the sale of goods the rule clearly is that time is *prima facie* of the essence with respect to delivery".

The contract sued on was clearly an ordinary commercial contract for the sale of goods. On the evidence, particularly the documentary evidence, and on the plaintiff's own pleadings, the plaintiff had clearly failed to prove that as regards the 7½ tons cardamons the stipulated time of delivery "within 3 days after the arrival of the ship" was not of the essence of the contract.

As regards the question of mercantile or trade usage the fact that the trial judge had been persuaded to find that the stipulation for delivery "within 3 days after the arrival of the ship" was the normal stipulation in this kind of trade and that this stipulation was generally not insisted upon strictly seems to us insufficient to establish the mercantile or trade usage relied on by the plaintiff if ever such a usage existed or could constitute a binding usage. Furthermore, there was no evidence at all that this stipulation as to time for delivery was the normal stipulation in this kind of trade.

As regards the issue of waiver, it is to be observed that the trial judge found both the plaintiff and the proprietor of the defendant firm unsatisfactory and unreliable witnesses. Furthermore, it was common ground on the evidence that at the relevant period the price of cardamons, which is a spice, fluctuates daily and that on the 10th November 1966 the market for cardamons was on a downward trend. It should also be observed that waiver was raised for the first time at the commencement of the trial of the action and the particulars of waiver as pleaded did not specify what conduct on the part of the defendant firm was relied on as waiver. The evidence of the plaintiff, in our opinion, amounted at best to no more than a refusal by the defendant firm to accept the goods unless they were repaid a sum of $6,000, admittedly owing by the plaintiff. It was clear on the evidence that the plaintiff did not have sufficient funds or credit facilities to enable him to obtain the bills of lading relating to the 7½ tons cardamons and that he was during the period just before the arrival of the s.s. *Manoloeverett* until 14th November 1966 making strenuous but futile attempts to enable him to obtain the release of the cardamons from the godown of the Singapore Harbour Board so that he could deliver them, as he was bound to under the contract, to the defendant firm. There was accordingly no evidence, in our view, to support the trial judge's finding that the subsequent conduct of the proprietor of the defendant firm in the various meetings and discussions between him and the plaintiff amounted to a waiver of the defendant firm's right to delivery within the stipulated time.

For all these reasons we allowed the appeal with costs here and in the court below.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; J. B. Jeyaretnam & Co.*